

114 FERC ¶ 61,198
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suede G. Kelly.

Duke Energy Marketing America, LLC,
CenterPoint Energy Gas Transmission Company,
Kern River Gas Transmission Company

Docket No. RP06-179-000

ORDER ON WAIVERS

(Issued February 24, 2006)

1. On January 20, 2006, Duke Energy Marketing America, LLC (DEMA), CenterPoint Energy Gas Transmission Company (CenterPoint) and Kern River Gas Transmission Company (Kern River) (jointly, Petitioners) filed a petition for a limited waiver of certain Commission policies and regulations and certain pipeline tariff provisions. In sum, Petitioners request waiver of: (i) the Commission's policy espoused in Order No. 637-A¹ prohibiting the tying of non-jurisdictional gas transmission contracts to released transportation capacity; (ii) the Commission's regulations requiring that capacity not be released at a rate higher than the maximum recourse rate; (iii) the Commission's policies prohibiting the permanent release of a temporary release transaction, and; (iv) certain capacity release tariff provisions related to the CenterPoint and Kern River systems. As discussed below, the Commission will grant the requested waivers with certain exceptions.

¹ Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, Order No. 636, 57 Fed. Reg. 13,267 (April 16, 1992), FERC Stats. and Regs., Regulations Preambles (January 1991 - June 1996) ¶ 30,939 at 30,446-48 (April 8, 1992); *order on reh'g*, Order No. 636-A, 57 Fed. Reg. 36,128 (August 12, 1992), FERC Stats. and Regs., Regulations Preambles (January 1991 - June 1996) ¶ 30,950 (August 3, 1992); *order on reh'g*, Order No. 636-B, 57 Fed. Reg. 57,911 (December 8, 1992), 61 FERC ¶ 61,272 (1992); *reh'g denied*, 62 FERC ¶ 61,007 (1993); *aff'd in part and remanded in part*, United Distribution Companies v. FERC, 88 F.3d 1105 (D.C. Cir. 1996); *order on remand*, Order No. 636-C, 78 FERC ¶ 61,186 (1997).

Background

2. DEMA states that in 2005 its parent, Duke Energy Corporation, and Cinergy Corporation agreed to merge and then restructure various business units within the merged company.² DEMA states that in anticipation of these merged operations, it is actively divesting itself of various natural gas transportation, storage, supply, and delivery operations associated with certain merchant generation plant that will not remain in the asset base of the merged company. DEMA states that it is taking a structured approach to winding down its operations to ensure the continued performance of its contractual obligations while maximizing the value of its assets. DEMA states that it is conducting a “data-room” process in which a number of interested parties have been allowed (subject to the execution of appropriate non-disclosure agreements) to examine and bid upon portions of DEMA’s nationwide “book” of business assets. In certain instances, DEMA has packaged groups of logically and operationally associated assets into a discrete portfolios.

3. DEMA states that a Prearranged Replacement Shipper is willing to accept a permanent release of a portfolio of 16 transportation contracts, subject to bid and the Prearranged Replacement Shipper’s right to match (Portfolio).³ DEMA states that the instant portfolio contains eleven Commission-regulated interstate transportation contracts, as well as five transportation contracts on upstream Canadian pipelines.⁴ DEMA states that the Portfolio is comprised of those specific transportation assets that provide market outlets for the Prearranged Replacement Shipper’s gas supplies.

² The Commission authorized this merger on December 20, 2005. *Duke Energy Corp. and Cinergy Corp.*, 113 FERC ¶ 61, 297 (2005).

³ DEMA states that the Prearranged Replacement Shipper is not affiliated with DEMA, CenterPoint, or any of the other jurisdictional pipelines whose capacity is included in the Portfolio.

⁴ DEMA states that the instant portfolio presently contains two CenterPoint contracts (one of which is a negotiated rate contract), two ANR Pipeline Company (ANR) contracts, four Gas Transmission Northwest Corporation (GTNW) contracts, one Kern River Gas Transmission Company (Kern River) released capacity contract, held by Duke Energy Trading and Marketing, L.L.C., one Southern Star Central Gas Pipeline Inc. (Southern Star) contract, one Natural Gas Pipeline Company of America (Natural) contract, and five Canadian contracts (two TransCanada Pipelines, Ltd. - BC System (ANG) contracts; one TransCanada Pipelines, Ltd - Canadian Mainline. (TCPL Mainline) contract; and two NOVA Gas Transmission Ltd. (NOVA) contracts).

4. DEMA states that it has recently executed a binding Prearranged Capacity Release and Assignment Agreement, with this qualified, creditworthy, Prearranged Replacement Shipper. DEMA states that its Agreement binds DEMA and the Prearranged Replacement Shipper to effectuate the permanent release (and, in the case of the Canadian contracts, direct assignment) of all transportation contracts, as an intact package of contracts, at the applicable contract rate for the full remaining term of the contracts within the Portfolio, to be effective April 1, 2006. Most of the contracts provide for the shipper to pay the pipeline's maximum rate. However, two of the contracts contain negotiated rates, one of which is currently above the maximum rate. Two other contracts specify a discounted rate below the maximum rate. DEMA states that because of current market conditions, it has agreed to make a payment (Reverse Auction Payment) to the instant Prearranged Replacement Shipper as consideration for the Prearranged Replacement Shipper acquiring the Portfolio.

5. DEMA asserts that because the Commission-jurisdictional contracts within the Portfolio cannot be released without being subject to the Commission's capacity release bidding process, DEMA has requested that CenterPoint (the host pipeline) treat the capacity Portfolio as a prearranged deal, and post it for competing bids, with the bids being evaluated on the basis of which shipper will require the smallest payments by DEMA to the shipper in order to consummate the transfer of the Portfolio (a "reverse auction" bidding process).⁵ DEMA states that because the bidding process will take place only on CenterPoint's internet website, each of the other regulated pipelines whose capacity is included in the subject portfolio will be requested to post an informational notice on its internet website to alert interested parties that DEMA's capacity with that pipeline will be offered for release as a part of a Portfolio release transaction to be conducted on CenterPoint's website. DEMA states that at the end of the open season it will post the requisite information on each of the affected pipelines to alert all parties of the permanent release transactions.

⁵ The Commission has previously described a reverse auction process in general terms, stating that under a reverse auction the releasing shipper proposes to release the pipeline capacity it holds to a replacement shipper for the maximum rate. The pipeline then conducts a reverse auction for the releasing shipper. In the reverse auction, the potential replacement shippers bid the amounts that they are willing to receive from the releasing shipper to take the releasing shipper's capacity at maximum rate. The replacement shipper willing to take the least amount of money from the releasing shipper is the winner of the capacity under the reverse auction. *Northwest Pipeline Corp. and Duke Energy Trading and Marketing*, 109 FERC ¶ 61, 044 at P12 (2004). (*Northwest*)

6. The Petitioners state that the waivers requested herein are necessary to effectuate the permanent transfer, consistent with the Commission's capacity release policies and regulations, of this capacity portfolio to DEMA's Prearranged Replacement Shipper (or any successful third-party bidder that may later emerge), using a consolidated, reverse-auction bidding process. The Commission will address the requested waivers below.

Public Notice, Interventions and Protests

7. Public notice of the instant filing was issued with interventions and protests due as provided in section 154.210 of the Commission's regulations (18 C.F.R. § 154.210 (2005)). Pursuant to Rule 214 (18 C.F.R. § 385.214 (2005)), all timely filed motions to intervene and any motions to intervene out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties. On February 1, 2006, Natural Gas Pipeline Company of America (Natural) filed a protest to the instant proceeding.

8. Natural states that it opposes the instant petition to the extent that the petition entails a release of capacity on Natural's system as part of a composite package across multiple interstate and Canadian pipelines through postings on CenterPoint's internet web site. Natural asserts that although this proposal entails a waiver of Natural's tariff provisions on capacity release, Natural has not requested such a waiver. Natural asserts that this procedure is, therefore, contrary to the ordinary tariff change procedures under sections 4 and 5 of the Natural Gas Act. (NGA). Natural argues that absent a waiver, the procedure set forth violates various provisions in section 19 of Natural's FERC Gas Tariff, Sixth Revised Volume No. I (section 19), including section 19.5(a).⁶ Natural

⁶ Natural asserts that section 19.5(a) of its tariff states in relevant part that:

all terms and conditions relating to a release which is the subject of a Capacity Release Request: (1) must be nondiscriminatory and applicable to all potential bidders; (2) must be made available to Natural for posting; (3) must relate solely to the details of acquiring or maintaining the transportation capacity rights on Natural, which are the subject of the release; and (4) must not place any obligations or burdens on Natural in addition to the terms and conditions applicable to a capacity release under this Section 19 which are specified in Natural's Tariff . . . Fourth Revised Sheet No. 293.

argues that waiver of section 19 should not be granted as to the Natural contract,⁷ for reasons relating to the fairness and market effectiveness of the bidding process proposed by the Petitioners.

9. Natural asserts that the proposed single package approach excludes many potential bidders, which reduces the fairness and efficiency of the market because shippers cannot bid on only the capacity they want. Natural asserts this runs counter to the general rule that bidders should be able to bid on all or a portion of the capacity offered.⁸ Natural also argues that DEMA has given its prearranged shipper a competitive advantage because it is unlikely that other bidders will be found that are willing to bid on the entire package given the time frame for posting and bidding and that the single bidding platform for capacity on multiple pipelines obscures the value of the capacity. Natural also asserts that using the CenterPoint website as the host website disadvantages bidders unfamiliar with the bidding procedures and intricacies of the CenterPoint site.

10. Natural asserts that the Petitioners cite, *inter alia*, *Northwest Pipeline Corporation and Duke Energy Trading and Marketing*, 109 FERC ¶ 61, 044 (2004), in support of their aggregation of contracts. However, Natural asserts that the current proposal involves aggregation of more pipelines and more contracts, some discounted and some at maximum or negotiated rates than the cited proceeding. Natural argues that there is little if any relationship between the contracts included in the instant package and that Natural has not agreed to the aggregation of its contract. Natural asserts that in these circumstances, the market efficiencies are undercut, not enhanced, by the aggregation across pipelines.

11. Natural argues that under Commission policy, an interstate pipeline can refuse consent to a permanent release of capacity so long as the withholding of consent is reasonable and that it views the proposed procedure in the Joint Petition as an attempt to foreclose that option to Natural. Natural asserts that the proposed bidding process makes

⁷ Natural states that DEMA and Natural are parties to a firm transportation agreement dated June 18, 1993, (Contract No. 105436) with an MDQ of 10,236 Dth/day and a term ending July 31, 2008, that DEMA proposes to include in the reverse auction on CenterPoint's website.

⁸ Natural Protest at 6, citing, *Pacific Gas Transmission Co.*, 64 FERC ¶ 61,052, at. 61,463 (1993); *Western Gas Interstate Co.*, 63 FERC ¶61,278 at 62,780 (1993); *Trunkline Gas Co.*, 62 FERC ¶61,199 at 62,425 (1993); *Natural Gas Pipeline Company of America*, 93 FERC ¶61,075 at. 61,204 (2000).

it impossible to obtain bids reflecting the true value of capacity on each pipeline. Natural argues that without knowing the precise details of the release, how the replacement contracts will work, and whether the process accurately reflects the value of capacity, Natural cannot be expected to waive its rights to evaluate a request for permanent release. In this vein, Natural asserts that the proposal fails to address adequately creditworthiness and other requirements of contracting on the individual pipelines.

Discussion

12. DEMA asserts that it is divesting itself of various natural gas transportation, storage, supply and delivery operations in order to implement a restructuring of its business activities in light of a corporate merger. In *Northwest Pipeline Corp. and Duke Energy Trading and Marketing*, 109 FERC ¶ 61, 044 (2004), *order on clarification*, 112 FERC ¶ 61, 187 (2005) (*Northwest*)⁹ the Commission considered a similar request for various waivers from an affiliate of DEMA's, Duke Energy Trading and Marketing (DETM). As discussed in *Northwest*, the Commission's view is that a releasing shipper that is attempting to exit the gas transportation business, should, within certain limitations, be permitted to exit in a rational and orderly fashion, if such action is open and will not unduly discriminate against other shippers. Here, DEMA has proposed to aggregate capacity to be released, and has arranged to accept bids on the capacity on CenterPoint's website through a reverse auction procedure subject to match by a prearranged shipper.

⁹ In *Northwest*, the Commission found that:

The requested waivers are necessary to permit DETM to effect a permanent release of its collection of Northwest contracts in one package. Northwest and DETM have generally proposed an open and transparent auction process for DETM's assets; therefore, because of the transparency of the auction process proposed and because of the unique circumstances concerning DETM's attempt to exit the natural gas market in the Northwest in an orderly fashion, the Commission will grant the requested waivers to modify Northwest's electronic bidding process to: (1) permit the permanent releases of capacity even as encumbered with temporary releases; (2) post the subject contracts as a single package; (3) permit bidding based on confidential disclosures; and (4) permit replacement shippers to assume permanently released contracts as proposed in the instant application. *Id.* at P 9.

13. Consistent with its findings in *Northwest*, the Commission finds that DEMA has proposed an open and transparent manner in which to undergo the process of divesting itself of its natural gas obligations. Therefore, as discussed below, the Commission will deny Natural's protest as it relates to the method employed by DEMA to accomplish its exit from its natural gas obligations, except to the extent that the petitioner's proposal seeks to auction capacity held on Natural's system on CenterPoint's website. The Commission will also grant the necessary waivers to permit DEMA to accomplish its goal subject to the limitations set forth below.

Tying Prohibition Waiver

14. Petitioners request waiver of the Commission's "tying prohibition" which holds that a releasing shipper cannot tie the release of its capacity to any extraneous conditions.¹⁰ Petitioners request waiver of this policy so that DEMA may include, in its capacity release portfolio, five non-jurisdictional transportation contracts on upstream Canadian pipelines. Petitioners assert that inclusion of these non-jurisdictional contracts

¹⁰ The Commission articulated this prohibition against the tying of capacity in Order No. 636-A, where it stated that:

Releasing shippers may include in their offers to release capacity reasonable and non-discriminatory terms and conditions to accommodate individual release situations, including provisions for evaluating bids. All such terms and conditions applicable to the release must be posted on the pipeline's electronic bulletin board and must be objectively stated, applicable to all potential bidders, and non-discriminatory. For example, the terms and conditions could not favor one set of buyers, such as end users of an LDC, or grant price preferences or credits to certain buyers. The pipeline's tariff also must require that all terms and conditions included in offers to release capacity be objectively stated, applicable to all potential bidders, and non-discriminatory. Order No. 636-A at p. 30,557

* * *

The Commission reiterates that all terms and conditions for capacity release must be posted and nondiscriminatory, and must relate solely to the details of acquiring transportation on the interstate pipelines. Release of pipeline capacity cannot be tied to any other conditions. Order No. 636-A at p. 30,559.

in the portfolio will permit DEMA to exit the gas business in a more orderly manner, preserve all parties' contractual rights, and meet the Commission's policy goal of ensuring the efficient transfer of capacity under an open and transparent bidding process.

15. Petitioners argue that the purpose of the tying prohibition policy is to protect the capacity release market from being undermined by the release of capacity tied to undisclosed, extraneous conditions. In the instant proceeding, Petitioners assert DEMA will release the jurisdictional and non-jurisdictional capacity in an open and transparent manner by identifying and describing the jurisdictional contracts as well as the non-jurisdictional Canadian upstream capacity and including copies of all the relevant contracts for inspection. They state that DEMA also proposes to afford interested bidders a 10-day evaluation period to consider DEMA's portfolio. The Petitioners also argue that the Commission has previously granted requests to waive its tying prohibition policy under circumstances similar to the instant request.¹¹

16. As the Petitioners point out, the Commission has granted waivers of its tying prohibition policy under similar circumstances. In *Northwest*, the releasing shipper proposed to release pipeline capacity packaged with its gas delivery contracts in an attempt to exit the gas transportation business in an orderly manner. The Commission granted the request for waiver of its tying prohibition because the releasing shipper was attempting to exit the gas transportation business, and, therefore, the Commission reasoned that it should be permitted to do so, within certain limitations, in a rational and orderly fashion, if such action was open and would not unduly discriminate against other shippers.¹²

17. Here, the Commission faces a similar situation where DEMA is attempting to divest itself of various natural gas transportation, storage, supply and delivery operations in anticipation of the merger of its parent company. Consistent with Order No. 636-A, and the requirements set forth in *Northwest*, DEMA proposes a process to establish "reasonable and non-discriminatory terms and conditions to accommodate individual release situations, including provisions for evaluating bids."¹³ Therefore, for good cause shown, the Commission's waives its policies concerning the tying of capacity to permit

¹¹ Transmittal letter at 7, citing, *Northwest Pipeline Corp. and Duke Energy Trading and Marketing* 109 FERC ¶ 61,044 (2004) and *Tennessee Gas Pipeline Co. and Dartmouth Power Associates*, 111 FERC ¶ 61,509 (2005).

¹² 109 FERC at P 29-31.

¹³ Order No. 636-A at 30,559.

DEMA to include, in its capacity release Portfolio, the five non-jurisdictional transportation contracts on upstream Canadian pipelines.

18. Further, as noted above, DEMA proposes a 10-day evaluation period for interested parties to evaluate the capacity release Portfolio offered by DEMA. The Commission finds that this period affords interested shippers sufficient time to consider the released capacity.

Waiver of Maximum Rate Cap

19. The Petitioners request that the Commission grant waivers of both section 284.8(e) of the Commission's regulations,¹⁴ and CenterPoint's General Terms and Conditions (GT&C) § 19.5(c),¹⁵ both of which prohibit the release of capacity for more than the maximum tariff rate for that capacity.

20. First, the Petitioners point out that one of the contracts that DEMA wishes to permanently release as part of the instant Portfolio is a CenterPoint contract containing a negotiated formula rate.¹⁶ They state that the contract does not contain a stated rate in excess of CenterPoint's maximum rate, but that under current market conditions, the formula rate contained in the contract currently produces a rate level that exceeds

¹⁴ 18 CFR § 284(e) (2005) provides in part:

The pipeline must allocate released capacity to the person offering the highest rate (not over the maximum rate).

¹⁵ DEMA and CenterPoint state that section 19.5(c) of CenterPoint's GT&C provides that:

Bids shall be solicited and submitted only as to the reservation or demand component (and any surcharges and other fixed costs applicable thereto) of the applicable maximum rate. Shipper cannot release capacity for an effective price less than or greater than Transporter's applicable minimum or maximum, respectively, rates, as on file and in effect from time to time.

¹⁶ DEMA and CenterPoint identify the subject negotiated rate contract as CenterPoint contract Contract No. 1002198.

CenterPoint's maximum rate.¹⁷ DEMA, Centerpoint and the Prearranged Replacement Shipper assert that releasing this contract at its negotiated rate will minimize the economic and administrative disruptions that would occur if the contract were otherwise released at some stated, non-contract rate. The Petitioners state that releasing this negotiated rate contract at its stated negotiated rate will also ensure that CenterPoint is economically indifferent to the proposed release and thus be willing to a permanent release of the contract.

21. Therefore, the Petitioners request that the Commission waive section 284.8(e) of its regulations and section 19.5(c) of CenterPoint's tariff to allow DEMA to release its CenterPoint contract at the negotiated formula rate stated in the contract.¹⁸

22. Second, the Petitioners request that the Commission further waive these regulations and tariff provisions to the extent necessary to allow bidders in the reverse auction open-season to bid not just smaller reverse auction amounts, but to submit bids providing for a payment to DEMA if desired. They state that although the Prearranged Replacement Shipper has required DEMA to pay a lump sum amount to induce it to pay the contract rate for each transportation contract, this lump sum amount is relatively small, and DEMA asserts that other bidders may ascribe a positive value to the entire Portfolio.

23. The Petitioners argue that in its October 25, 2005 order in *Transco*, the Commission did not intervene to prohibit the releasing shipper from specifying in its release notice that interested bidders may submit bids in excess of the stated negotiated

¹⁷ The Petitioners assert that in addition to the CenterPoint contract at issue here, the subject Portfolio contains only one other negotiated rate contract related to capacity on the ANR system. The Petitioners assert that the ANR contract cannot, by its terms, exceed ANR's maximum rate. Accordingly, the Petitioners are seeking rate cap waivers only with respect to DEMA's CenterPoint contract. The Petitioners state that they recognize that, independent of the instant rate cap waiver request, the Commission's approval of the transfer of ANR and CenterPoint negotiated rate contracts is required. They assert that ANR and CenterPoint will independently submit such requests for approvals in their negotiated rate dockets (Docket No. RP99-301 and Docket No. RP96-200, respectively), after the Commission has granted the waivers requested herein.

¹⁸ Transmittal letter at 10, *citing, Tennessee Gas Pipeline Co.*, 113 FERC ¶ 61,106 (2005) and *Transcontinental Gas Pipe Line Corp.*, 113 FERC ¶ 61,097 (2005).

rate for the subject.¹⁹ The Petitioners argue that in this circumstance, allowing bidders to submit positive bids, rather than terminating the bidding when the reverse auction bids reach zero, will ensure that the Portfolio is awarded to the party who values it the most, consistent with the Commission's allocative efficiency objectives. Therefore, the Petitioners request that the Commission grant waivers of section 284.8(e) of its regulations and CenterPoint's GT&C section 19.5(c) to allow DEMA to condition its reverse auction posting: (i) to allow bidders to submit positive reverse auction bids for DEMA's Portfolio, and (ii) to permit CenterPoint to award the Portfolio to the qualified bidder submitting the lowest reverse auction bid amount, or, if applicable, the highest positive bid amount.

24. The Commission will grant the requested waivers, in part. Sections 284.8(c) through (e) of the Commission's regulations require that capacity offered for release at less than the maximum rate must be posted for bidding, and the pipeline must allocate the capacity "to the person offering the highest rate (not over the maximum rate)." Section 284.8(h) provides that prearranged capacity releases at the maximum rate need not be posted for bidding. The Commission has held that any consideration paid by the releasing shipper to a prearranged replacement shipper must be taken into account in determining whether the prearranged release is at the maximum rate. Thus, where the replacement shipper agrees to pay the pipeline the maximum rate for the released capacity, but the releasing shipper agrees to make a payment to the replacement shipper, the release must be treated as a release at less than the maximum rate to which the posting and bidding requirements of sections 284.8(c) through (e) apply.

25. In this case, the Commission is permitting DEMA to release, in a single package, eleven jurisdictional contracts, including seven contracts at the maximum rate, two at a discounted rate, and two at negotiated rates, one of which is currently above the maximum rate. Petitioners have not stated in their request for waiver either (1) the amount of DEMA's reverse auction payment to the prearranged replacement shipper, (2) the level of the discounts in the discounted rate contracts, or (3) the amount by which the negotiated rate contract exceeds the maximum rate. Thus, it is not clear whether, viewing the package as a whole, the prearranged shipper's overall cost of obtaining the subject capacity would be more or less, than if it simply paid the various maximum rates applicable to the capacity. Moreover, since different parties may place different values on the various transportation contracts at issue, it is not possible to attribute any portion of the reverse auction amount to any particular transportation contract. Indeed, for this

¹⁹ Transmittal letter at 11, *citing*, *Transcontinental Gas Pipe Line Corp.*, 113 FERC ¶ 61,097(2005) (*Transco*).

reason, DEMA proposes to require all bidders to bid a single overall reverse auction amount applicable to all the capacity being released. In these circumstances, the Commission is willing to grant a waiver of the section 284.8(e) prohibition on bids in excess of the maximum rate to the extent necessary to permit DEMA to permanently release the subject capacity at no cost to it. In other words, DEMA may seek bids on its reverse auction payment that would reduce that payment to zero. To the extent this results in the winning bidder paying up to the negotiated contract rate for released capacity subject to an above maximum rate negotiated rate, the Commission is willing to permit such a result based upon DEMA's representations that it is attempting to divest itself of its natural gas contracts due to a corporate merger.

26. The Commission denies waiver of its regulations and pipeline tariff provisions to the extent Petitioners request authorization to seek reverse auction bids that would result in payments to DEMA, instead of DEMA paying the winning bidder an amount to take the capacity. The Petitioners raise two basic points to support their request on this issue. Neither point persuades the Commission to grant the requested waiver.

27. First, the Petitioners argue that their request will ensure that the Portfolio is awarded to the party who values it the most, consistent with the Commission's allocative efficiency objectives. The Commission's goal of allocative efficiency is sometimes described in short-hand fashion as awarding capacity to those who value it the most, as suggested by the Petitioners. However, the Commission's actual policy is to award capacity to those who value it the most up to the maximum tariff rate for the capacity in question. This concept is set forth in section 284.8(e) of the Commission's capacity release regulations which provide that the pipeline must allocate released capacity to the person offering the highest rate which is not over the maximum rate. Thus, the Commission's general policy favoring allocation of capacity to those who value it the most does not, by itself, justify waiver of the price cap.

28. Moreover, the Petitioners argue that in the October 25, 2005 Order in *Transco*, the Commission did not intervene to prohibit the releasing shipper from specifying in its release notice that interested bidders may submit bids in excess of the stated negotiated rate for the subject releases. However, the October 25, 2005 Order in *Transco* cited by the Petitioners, stated that it was unclear whether certain capacity release postings required the replacement shipper to pay the full negotiated rate or only required the replacement shipper to pay up to the maximum reservation rate. Upon receiving further information, the Commission issued a second order on December 29, 2005, in which it accepted the subject contracts and granted waiver of its regulations to permit the releasing shippers to release their capacity at the full negotiated rates they were paying but denied a waiver which would have allowed for bids on the capacity for more than the

negotiated rate paid by the releasing shipper.²⁰ The Commission finds that granting a waiver to permit DEMA to obtain more than the negotiated rate under the CenterPoint contract is not necessary to accomplish its stated purpose of divesting natural gas contracts. Accordingly, the Commission denies the requested waiver. While the Commission is willing to waive its regulations to permit a shipper to minimize its costs of exiting the gas business and facilitate the permanent release of capacity to other shippers, the Commission will not waive its regulations simply to enable the exiting shipper to earn or maintain profit.

29. The Commission recognizes that the portfolio DEMA is releasing includes discounted rate contracts. In certain circumstances, the release of discounted contracts may result in payments to the releasing shipper. For example, if DEMA were to release such discounted contracts separately it could seek bids up to the maximum rate applicable to those contracts without waiver of the regulations. However, in the instant case, where DEMA has chosen to aggregate several types of capacity in a single portfolio where the value of each is indeterminate, the Commission will not grant a waiver to permit the releasing shipper to obtain bids in excess of its costs under the contracts and thereby profit from the Commission's waiver of its regulations.

CenterPoint Tariff Waivers

30. DEMA proposes to release its capacity portfolio using CenterPoint's internet website. To do so, Petitioners request limited waiver of certain capacity release provisions set forth in section 19 of CenterPoint's GT&C. First, Petitioners contend that CenterPoint's capacity release provisions suggest that CenterPoint must separately post each individual contract it plans to release. Petitioners seek waiver of all applicable tariff provisions to allow CenterPoint to release its multi-contract portfolio as a single package.

31. Second, Petitioners assert that CenterPoint's capacity release provisions only contemplate the posting of capacity releases associated with CenterPoint's system. DEMA's capacity release portfolio includes service agreements for capacity on other pipelines. Accordingly, Petitioners request waiver to allow DEMA to post capacity releases for service on non-hosting pipelines on CenterPoint's internet website. Petitioners assert that CenterPoint will make the proper informational posting for all releases in its portfolio – including those on non-host pipelines – on its internet website. They add that, to ensure all interested parties are aware of the auction, the non-hosting pipelines will post notice on their own respective websites of auction on CenterPoint's website.

²⁰ *Transcontinental Gas Pipe Line Corp.*, 113 FERC ¶ 61, 331 (2005).

32. Third, section 19.11(m) of CenterPoint's GT&C requires capacity releases to be implemented electronically. Petitioners request waiver of this provision so that CenterPoint can implement a manual posting and bidding auction should it not be able to implement the auction electronically. Fourth, section 1.1(i) of CenterPoint's GT&C contemplates parties providing bid prices in the form of volumetric rates or on a demand charge basis. Petitioners request waiver of the provision so parties can bid a lump sum amount in the reverse auction. Fifth, section 19.4(b) of CenterPoint's GT&C allows parties to bid on a portion of the capacity being released. Petitioners request waiver of this provision because parties will be required to bid on the entire portfolio.

33. Finally, DEMA proposes that parties determine the maximum value of its portfolio through a reverse auction, as described above. The Petitioners assert that CenterPoint's tariff identifies four bid-evaluation methodologies from which the releasing shipper may choose. However, DEMA's proposed reverse auction methodology is not one of the four identified methods of bid evaluation. Petitioners request waiver of this and any other pertinent provisions of CenterPoint's tariff to permit DEMA to implement its reverse auction.

34. As the Commission has found that the DEMA has proposed an open and transparent manner in which to undergo the process of divesting itself of its natural gas obligations, the Commission, for good cause shown, will grant waiver of these requested tariff provisions in order to accomplish the reverse auction procedure.

Concerns of Non-Hosting Pipelines

Natural Gas Pipeline of America

35. As stated above, Natural has protested the instant proceeding to the extent that the petition entails a release of capacity on Natural's system as part of a composite package through postings on CenterPoint's internet website. Natural points out that it has not requested any waiver of its tariff which would be necessary to conduct this auction as proposed and that it should not be deprived of its right to refuse to consent to a permanent release of capacity so long as the withholding of consent is reasonable. Natural asserts that without knowing the precise details of the release, how the replacement contracts will work, and whether the process accurately reflects the value of capacity, it cannot be expected to waive its rights to evaluate a request for permanent release. Moreover, Natural asserts that the proposal fails to address adequately any concerns it might have regarding the creditworthiness of the replacement shipper chosen through the proposed process. Natural asserts that it is unclear whether the bidders will meet the requirements of its tariff.

36. The Commission agrees with Natural on this point and will not permit Natural's capacity to be released through postings on CenterPoint's website, contrary to Natural's tariff, absent Natural's agreement. The Commission agrees with Natural that it cannot be required to agree in advance to a permanent release of capacity. The Commission's general policy is that a pipeline may not unreasonably refuse to relieve a releasing shipper of liability under the contract where there is a permanent release of capacity.²¹ However, the Commission has recognized that in some instances a pipeline may not be financially indifferent to the proposed release of capacity,²² and must have the opportunity to demonstrate that it has a reasonable basis for withholding its consent:

It is clear from *Overthrust*[²³] that even when the maximum rate will be paid by a replacement shipper, the Commission will allow a pipeline to demonstrate that in the circumstances of a particular permanent capacity release transaction, withholding a release of liability would be reasonable and therefore that a release should not be required.²⁴

37. Natural has asserted that the methodology implemented in the instant proposal would yield an indeterminate valuation of its capacity and that it is unclear whether all of the creditworthiness standards of its tariff would be met. Given this, Natural may not be financially indifferent to the proposed release of its capacity in the manner proposed. Therefore, the Commission will not require Natural to permanently release its capacity under terms different from those contained in its tariff where Natural may be assured of its financial indifference to the permanent release.

38. The Commission has found that consistent with Order No. 636-A, and the requirements set forth in *Northwest*, DEMA proposes a process to establish "reasonable and non-discriminatory terms and conditions to accommodate individual release situations, including provisions for evaluating bids."²⁵ Natural also is correct that it can require that the capacity in question be posted for bid on its website, rather than being

²¹ *El Paso Natural Gas Co.*, 113 FERC ¶ 61, 281 (2005), citing, *El Paso Natural Gas Co.*, 61 FERC ¶ 61,333 at 62,312 (1992).

²² *Id.*, citing, *Texas Eastern Transmission Corp.*, 83 FERC ¶ 61,092 (1998).

²³ Citing, *Overthrust Pipeline Co.*, 63 FERC ¶ 61,287 (1993) and 64 FERC ¶ 61,380 (1993).

²⁴ *Texas Eastern Transmission Corp.*, 82 FERC ¶ 61,118 at 61,438 (1998).

²⁵ Order No. 636-A at 30,559.

posted on CenterPoint's. However, DEMA may include, as a condition of any release of its capacity posted on Natural's website, that the replacement shipper simultaneously bid, and win, the package of capacity that DEMA is posting on the CenterPoint website. In this manner, any winning bidder of the Natural capacity would be subject to the terms of Natural's tariff and Natural could assure itself that it was financially indifferent to the permanent release.

Other Non-Host Pipelines

39. DEMA states that, with the exception of Natural, all non-hosting pipelines have agreed to: (1) allow DEMA to include its capacity in its portfolio and be subject to bidding on CenterPoint's website; and, (2) post on its own website information regarding the portfolio release. Further, DEMA asserts that, none of the non-hosting pipelines has identified any specific tariff provisions, that would have to be waived to effectuate the consolidated bidding process on CenterPoint's pipeline, with the exception of Kern River as discussed below. However, DEMA asserts that several of the non-hosting pipelines have identified potential issues that may require Commission authorization.

40. First, the winning replacement shipper will receive the capacity for each contract in the Portfolio under that contract's stated rate. The Petitioners state that several non-hosting pipelines are concerned that because DEMA will, in all probability, be required to make a lump-sum payment to the replacement shipper as part of the reverse auction process, the Commission may deem the portfolio contracts to be discounted and thus, the Portfolio would be required to be posted for bidding, even though DEMA has a prearranged shipper for the Portfolio. Accordingly, the Petitioners request that the Commission waive the tariff posting and bidding provisions of the non-hosting pipelines, as well as any other capacity release tariff provisions, to allow DEMA to effectuate its consolidated bidding process.

41. The Commission has determined that capacity obtained under the reverse auction methodology is to be considered discount capacity, because the replacement shipper is receiving payment from the releasing shipper and, therefore, is not truly paying the maximum rate for the capacity.²⁶ Therefore, such capacity, even if subject to a prearranged deal, must be subject to the bidding requirements. However, here, as in *Northwest*, the Commission finds that the proposed reverse auction procedure provides a transparent manner in which the value of the transportation capacity to a replacement

²⁶ *Pacific Gas Transmission Co. and Southern California Edison Co.*, 82 FERC ¶ 61,227 (1998).

shipper may be ascertained. The Commission, for good cause shown, will grant the requested waivers to permit the consolidated bidding process.

42. Second, Order No. 2004 requires interstate pipelines to report, on a dedicated portion of its website, all instances where it has used discretion under its tariff (18 C.F.R. § 358.5(c)(4) (2005)). Several non-hosting pipelines express concern that their participation in the proposed consolidation bidding process may constitute an exercise of discretion that requires such a posting. DEMA requests clarification as to whether non-hosting pipelines participating in the consolidated bidding process must post the proposed portfolio release notification in both the capacity release section of their respective websites and in their respective Order No. 2004 waiver postings. The Commission finds that posting of the capacity in the capacity release sections of the pipeline's website will be adequate to satisfy the waiver posting requirements in this circumstance.

43. Finally, section 15.5 of Kern River's GT&C requires that all shippers seeking to acquire capacity on Kern River's system must submit a bid on Kern River's designated website. Because all bidding for the portfolio will be done on CenterPoint's website, the Petitioners assert that Kern River seeks waiver of this provision of its tariff. For good cause shown, the Commission grants waiver of section 15.5 of Kern River's GT&C to allow for the consolidated auction on CenterPoint's website.

Limited Waiver to Allow Permanent Release of Kern River Contract

44. DEMA's capacity release portfolio includes a Kern River contract which is a temporary release of capacity held by DEMA's affiliate DETM.²⁷ The original shipper does not have recall rights to this released capacity. DEMA's Prearranged Capacity Release Agreement calls for its Prearranged shipper to assume DETM's rights under this contract for the full remaining term of the capacity release contract and for DETM's obligations for the released capacity to be terminated. DEMA asserts that as DETM's capacity release agent for this contract, it has contacted both Kern River and the original releasing shipper and that it has been authorized to state that neither objects to the substitution of the Prearranged shipper (or winning third party bidder of comparable creditworthiness) for DETM through a permanent release provided that the new replacement shipper meets Kern River's credit requirements and has resolved all outstanding imbalances.

45. Accordingly, the Petitioners request that the Commission grant all waivers necessary: (1) to allow the winning bidder to acquire, via a permanent release, DETM's

²⁷ Kern River Contract No. 7394.

Kern River released capacity; and, (2) subject to Kern River's approval, for DETM's contractual obligations with respect to that capacity to be permanently extinguished.

46. In *Northwest*, the Commission took specific notice of the temporary release contracts held by DETM, and stated that “[w]hile DETM can permanently release its own primary firm capacity, it cannot release capacity for which another shipper holds the primary capacity contract.” The Commission stated that DETM was free to re-release such contracts on a temporary basis, provided that the contracts did not prohibit such re-releases by their own terms.²⁸ Subsequently, DETM requested clarification of this finding and argued that it should be permitted to remove itself from the temporary release contracts and substitute a permanent replacement shipper. The Commission stated that it realized that such action would help effectuate DETM's exit from its gas marketing business but found that it lacked the information necessary in order to consider such a modification.²⁹

47. The Commission stated under the unique circumstances of an entity attempting to exit the gas trading business it would consider granting the permanent release of a temporary release if the request provided the contracts in question, the holders of the contracts and the current sub-releasers of the capacity. The Commission would also require that the releasing shipper also inform the Commission whether the holders of the primary capacity were served with the request and whether such primary holders of capacity have acquiesced in the proposal.

48. In the instant proceeding, DEMA asserts that both Kern River and the original releasing shipper do not object to the substitution of the Prearranged shipper (or winning third party bidder of comparable creditworthiness) for DETM through a permanent release provided that the new replacement shipper meets Kern River's credit requirements and has resolved all outstanding imbalances. Therefore, for good cause shown, the Commission grants the requested waiver subject to DEMA providing the Commission with the contract in question within 10 days of the instant order.

²⁸ 109 FERC at P15, *citing*, 18 C.F.R. § 284.12 (a)(1)(v), NAESB WGQ Standard 5.3.19 (requiring the re-release of capacity on the same terms and conditions as the primary release) and *Transcontinental Gas Pipe Line Corp.*, 87 FERC ¶ 61,120, at 61,486 (1999).

²⁹ *Northwest Pipeline Corp. and Duke Energy Trading and Marketing*, 112 FERC ¶ 61, 187 (2005).

The Commission orders:

(A) The waivers requested by the Petitioners are granted in part and denied in part as discussed in the body of this order.

(B) Within 10 days of the issuance of this order, the Petitioners must file a copy of Kern River Contract No. 7394 as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.